

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

ADVOCATES FOR RESPONSIBLE
DEVELOPMENT and JOHN DIEHL,

Petitioners,

v.

MARK and KIM MAREE JOHANNESSEN
and MASON COUNTY,

Respondents.

SHB NO. 05-014

ORDER ON PARTIAL SUMMARY
JUDGMENT

This matter comes before the Shorelines Hearings Board (Board) on a partial motion for summary judgment filed by Respondents Mark and Kim Maree Johannessen (Johannessens). Attorneys Roger A. Pearce and Catherine A. Drews represent the Johannessens. Mr. Diehl represents Petitioners Advocates for Responsible Development (ARD) and John Diehl (Diehl). Mason County did not participate in the motion

The Board considering the summary judgment motion was comprised of Bill Clarke, Chair, Mary Alyce Burleigh, and Kevin Ranker¹. Administrative Appeals Judge, Kay M. Brown, presided for the Board.

In ruling on the motions the Board considered the following material:

1. Petition for Review;
2. Johannessens' Motion to Dismiss Issues 2, 3, 4 and 5;

¹ A panel of three board members is hearing this appeal. See RCW 90.58.185.

3. Declaration of Kim Maree Johannessen in Support of Respondents' Motion to Dismiss Issues 2, 3, 4 and 5, with attached Exhibits A and B;
4. Declaration of Catherine A. Drews in Support of Respondents' Motion to Dismiss Issues 2, 3, 4 and 5 with attached Exhibits A, B, C, and D;
5. Petitioners' Response to Motion to Dismiss on Issues 2, 3, 4 and 5; and,
6. Johannessens' Reply to Petitioners' Response to Motion to Dismiss Issues 2, 3, 4 and 5.

Based upon the records and files in the case, and the evidence and arguments submitted by the parties, the Board enters the following decision.

FACTS

The Johannessens applied to Mason County for a shoreline substantial development permit (SDP) to construct a rock bulkhead on a vacant lot (Lot 3) abutting Pickering Passage. Kim Maree Johannessen is the owner of Lot 3. The construction of the rock bulkhead at issue on Lot 3 is being planned in conjunction with replacement of a pre-existing treated timber bulkhead on adjacent Lot 4, which is south of Lot 3. The replacement of the bulkhead on Lot 4 is exempt from permitting requirements because the lot contains a single-family residence. The construction of a bulkhead on a vacant lot, however, is subject to permitting requirements.

Declaration of Johannessen and attached Ex. A; MCC 7.17.110(b).

The County conducted a State Environmental Policy Act (SEPA) review of the proposed project and issued a Mitigated Determination of Nonsignificance (MDNS) on December 30, 2004. Mr. Diehl did not file an administrative appeal of the MDNS. ARD did file an appeal of

1 the MDNS, but did not file the required filing fee. *Declaration of Johannessen and attached Ex.*

2 A.

3 At the February 8, 2005, hearing on the SSDP, the Petitioners attempted to raise the
4 SEPA issue. The hearing examiner ruled that the Petitioners had failed to raise their SEPA
5 issues to the Board of County Commissioners, and were therefore precluded from raising them to
6 the hearing examiner. *Declaration of Johannessen and attached Ex. A.*

7 The County hearing examiner issued the County's final decision granting the SSDP on
8 May 4, 2005. *Declaration of Johannessen and attached Ex. A.* ARD and Mr. Diehl appealed to
9 this Board. A pre-hearing was conducted on June 30, 2005, and 10 issues were identified for the
10 appeal. The Johannessens moved for summary judgment on four of the 10 issues. The issues
11 subject to this partial summary judgment order are:

- 12 2. By issuing a Determination of Nonsignificance (DNS) and failing to consider the
13 cumulative impacts of granting a permit for bulk heading a vacant parcel, did
Mason County fail to comply with the requirements of chapter 43.21 RCW,
(SEPA)?
- 14 3. Should the Board dismiss petitioners' appeal of Mason County's SEPA
15 Determination for failure to exhaust administrative remedies before Mason
County?
- 16 4. By failing to consider the requirements of its Resource Ordinance, which appears
17 to be partly imported into its Shoreline Master Program through a provision in the
former that in cases of "overlap" between the former and the latter, the "more
applicable" policy or regulation shall prevail, did Mason County neglect to apply
the appropriate restrictions in granting the permit for bulk heading?
- 18 5. Should the Board dismiss petitioners' challenge to Mason County's application of
19 its underlying zoning (the Resources Protection Ordinance, Mason County Code
Chapter 17.01) because the Board lacks jurisdiction to review local zoning issues
20 that are not part of the local shoreline master program?

ANALYSIS

1. Summary Judgment Standard

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152, 1155 (1977). The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn. 2d 171, 182; 930 P. 2d 307, 313 (1997). A material fact in a summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P. 2d 1207, 1210 (1992). The trier of fact must construe the evidence and consider the material facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Weatherbee v. Gustafson*, 64 Wash. App. 128, 131, 822 P. 2d 1257 (1992).

In this case, neither side contends there are disputed issues of fact related to this partial summary judgment motion. The Board agrees there are no contested issues of material fact, and that these issues are appropriate for resolution on summary judgment.

2. SEPA Determination (Issues 2 and 3)

The Johannessens argue that the Petitioners are barred from challenging the County's SEPA determination in this proceeding because they failed to exhaust their administrative remedies on their SEPA claim at the County. Mason County Code (MCC) 8.32.030(a)(1)(A) states:

ORDER ON PARTIAL
SUMMARY JUDGMENT
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1 1) Any agency or person may appeal the county's procedural compliance with
2 Chapter 197-11 WAC for issuance of the following:

3 (A) A Final DNS. Appeal must be made to the board of county commissioners
4 within fourteen days of the date the DNS is final.

5 The Johannessens site to past Board decisions that require a litigant to first exhaust all
6 local administrative SEPA appeals before bringing SEPA issues to the SHB. See *Rebound v.*
7 *Pacificorp.*, SHB No. 95-22 (Order Granting Partial Summary Judgment, Jan. 11, 1996);
8 *Nooksack Indian Tribe v. Ecology*, SHB No. 95-1, PCHB No. 94-148 (Order Granting and
9 Denying Summary Judgment, 1995). In both of these cases, the Board held that a litigant must
10 exhaust administrative remedies pertaining to the procedural protections of SEPA prior to
11 bringing a procedural SEPA claim to the Board.

12 Petitioners do not dispute that MCC 8.32.030(a)(1)(A) allows an appeal of procedural
13 compliance with the SEPA rules pertaining to a DNS if filed within fourteen days of the date the
14 DNS is final. They also concede that they did not file a timely appeal of the MDNS before the
15 County, and they cannot now argue to this Board that the County improperly issued the MDNS.
16 Their position, however, is that their challenge to the MDNS is based upon Mason County's
17 alleged failure to consider cumulative impacts of permitting bulkheads on vacant land, and that
18 this is a substantive challenge, not a procedural one. They argue that a substantive challenge is
19 not foreclosed by the doctrine of exhaustion because the County does not provide an appeal
20 process for a challenge to the County's compliance with substantive SEPA requirements.

21 The Board agrees with Petitioners that they are not foreclosed from bringing a
substantive SEPA challenge to this Board. In *Nooksack*, the Board was presented with a similar

1 challenge to an MDNS issued by a Whatcom County official. The Whatcom County code
2 allowed an appeal of the MDNS to the hearing examiner, which the Tribe had failed to make.
3 The Tribe then tried to challenge the MDNS at the Board. The Board held that the Tribe was
4 precluded from challenging the procedural aspects of the MDNS, because it had failed to exhaust
5 its administrative remedies. The Board concluded, however, that the Tribe could raise
6 compliance with substantive SEPA.

7 Here, consistent with its decision in *Nooksack*, the Board concludes the Petitioners can
8 raise substantive SEPA issues, but not procedural ones. Finding the line between substantive and
9 procedural SEPA issues, however, is not easy. The Board disagrees with Respondents that
10 consideration of cumulative impacts is always procedural. If Petitioners' challenge is that
11 cumulative impacts were completely overlooked by the county in reaching its threshold
12 determination, then that could be considered a procedural challenge to the adequacy of the
13 county's threshold determination. However, if Petitioners' challenge goes to specific conditions
14 on the MDNS, or the absence of specific conditions in the face of specific adverse environmental
15 impacts identified in the environmental documents, and policies formally designated as possible
16 bases for the exercise of substantive SEPA authority, Petitioners' cumulative impacts challenge
17 could be considered substantive. The record before the Board on this summary judgment does
18 not contain a copy of the MDNS, nor does it contain much detail regarding the nature of
19 Petitioners' cumulative impact challenge. From this record it is not possible to determine
20 whether Petitioners are making substantive or procedural compliance arguments. Therefore,

1 construing the record on summary judgment most favorable to the non-moving party, the Board
2 declines to dismiss Issue 2.

3 3. County Resource Ordinance (Issues 4 and 5)

4 The Johannessens argue that the Board lacks jurisdiction to review whether the SSDP is
5 compliant with the County's resources protection ordinance because this ordinance is part of the
6 zoning code, not the Mason County Shoreline Master Program (MCSMP). They cite past
7 decisions of the Board for the proposition that the Board only has jurisdiction where the land use
8 code or comprehensive plan has been incorporated in the SMP, and where Ecology has reviewed
9 and approved the provision of the land use code as required by RCW 90.58.090(1). *Olwell v.*
10 *City of Bremerton*, SHB No. 04-017 (Findings of Fact, Conclusions of Law and Order, Feb. 28,
11 2005); *McNeal v. Douglas County*, SHB No. 04-002 (Order on Summary Judgment, Nov. 17,
12 2004.)

13 The Petitioners concede that the Board does not have jurisdiction over the SSDP's
14 compliance with the critical area ordinance. They respond, however, that they are not asking the
15 Board to determine compliance with Mason County's critical areas ordinance² (Resource
16 Ordinance). Rather, they are asking the Board to consider GMA-related evidence as it relates to
17 shoreline permit requirements. They contend this type of argument is allowed by the recent
18 *McNeal* decision.

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² Despite the wording of issue no. 4, Petitioners do not argue that the critical area ordinance has been incorporated into the MCSMP.

1 In *McNeal v. Douglas County*, the Board considered the effect of the Legislature's recent
2 integration of the SMA and GMA on the Board's jurisdiction over GMA issues. It stated:

3 The Board agrees that the Legislature has taken steps toward integration of SMA and
4 GMA, as evidenced by RCW 36.70A.480. The Board, however, does not read actions
5 integrating SMA and GMA as an affirmative grant of jurisdiction to determine whether a
6 project complies with GMA. Rather, the Board has previously ruled that when deciding
7 shoreline permit appeals involving GMA issues, the statutes should be construed to work
8 together.

9 The Board went on to state:

10 The issue to be decided after the hearing, of whether the proposed use complies with the
11 substantive policies and provision of the SMA relating to use and protection of the
12 shoreline, is a matter independent of GMA. Evidence relating to the GMA
13 comprehensive plan may be relevant, but this Board does not determine compliance with
14 GMA, or other land use laws not part of the local master program and SMA.

15 (citations deleted.)

16 As acknowledged by all parties, the Board lacks jurisdiction over the project's
17 compliance with the critical area ordinance. However, the Board agrees with Petitioners that it
18 can consider GMA related evidence if it relates to shoreline requirements. This evidence can be
19 brought offered to prove compliance with shoreline requirements and therefore it is not
20 necessary that it be identified in a separate issue. Therefore, Issue No. 4 is dismissed, and Issue
21 No. 5 is answered affirmatively.

From the foregoing, the Board issues this:

1 ORDER

2 Summary Judgment is denied on Issue No. 2, and Issue No. 3 is answered “no.”
3 Arguments and evidence related to Issue No. 2 are limited to substance, not process. Summary
4 Judgment is granted on Issue No. 4, and Issue No. 5 is answered “yes.” The Board will consider
5 GMA related evidence if it relates to shoreline requirements.

6 SO ORDERED this _____ day of _____, 2005.

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8 **SHORELINES HEARINGS BOARD**

9 _____
10 Bill Clarke, Chair

11 _____
12 Mary Alyce Burleigh, Member

13 _____
14 Kevin Ranker, Member

15 _____
16 Kay M. Brown
17 Administrative Appeals Judge
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